



UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

Order 2004-6-25

Issued by the Department of Transportation  
on the 28<sup>th</sup> day of June, 2004

Served: June 28, 2004

In the matter of

**U.S. PASSENGER AIR CARRIERS**

**Docket OST-2003-15021**

Waiver of the dormancy conditions on limited-entry route  
authority

Application of

**DELTA AIR LINES, INC.**

**Dockets OST-1998-6284  
and 2002-11711**

For a dormancy waiver Atlanta-Brazil

**ORDER**

**Summary**

By this order, we grant, subject to conditions, the request of Delta Air Lines, Inc. (Delta) for an amendment to conditions on its U.S.-Brazil frequency allocations in order to permit flexibility to use frequencies for Atlanta-Rio de Janeiro/Sao Paulo service. We also grant the other U.S. carriers designated for combination services in the U.S.-Brazil markets flexibility to use their allocated frequencies in markets where the carriers hold requisite underlying authority.<sup>1</sup>

**Delta's Notice and Request for Amendment**

On May 27, 2004, Delta notified the Department of its intent to commence a second daily Atlanta-Sao Paulo flight on or about December 1, 2004. Its notice states that in order to start the new service, it plans to resume service of seven U.S.-Brazil frequencies already allocated to Delta for use in another market (Atlanta-Rio de Janeiro), and it notes that those seven frequencies are under a dormancy waiver through December 31, 2004.<sup>2</sup> Delta also acknowledges that it requires Department permission to use the frequencies in a different market than the market for which the seven frequencies were originally allocated. Delta, therefore, requests an amendment to the conditions applicable to those seven frequencies to permit their use on the Atlanta-Sao Paulo routing. Delta maintains that it is in the public

<sup>1</sup> The four U.S. carriers designated for combination air services between the United States and Brazil are Delta, American Airlines, Inc. (American), Continental Airlines, Inc. (Continental) and United Air Lines, Inc. (United).

<sup>2</sup> See Notice of Action Taken, dated February 24, 2004, in Dockets OST-2003-15021, -1998-6284, and -2002-11711.

interest for Delta to have the flexibility to use the allocated frequencies in either the Atlanta-Sao Paulo or Atlanta-Rio de Janeiro service, as dictated by market conditions, and that this flexibility would enable Delta to use all fourteen of its allocated frequencies and, thus, would provide valuable service and competition benefits to the traveling and shipping public.

### **Responsive Pleadings**

American and Continental filed answers, and Delta filed a response.<sup>3</sup>

American and Continental do not object to Delta's request provided that other carriers holding Brazil frequencies are awarded flexibility to convert their own city-pair specific frequencies to other markets as conditions warrant, thus converting city-pair specific frequencies to country-pair frequencies. Both further state that such conversion would afford all parties the same flexibility and would reduce unnecessary administrative burdens by eliminating the requirement that carriers must seek prior approval whenever they wish to move their frequencies from one city-pair to another in order to respond to market conditions as needed to optimize U.S.-Brazil service.

In its response, Delta affirms that it has polled U.S. carriers and that none objects to Delta's request to use seven U.S.-Brazil frequencies to operate a second Atlanta-Sao Paulo flight. Of the American and Continental suggestion that all U.S. carriers be given the same flexibility, Delta states it has no objection in principle provided that it does not cause delay in issuance of a decision on this matter. Delta further states that while it favors removing all city-pair restrictions on U.S.-Brazil frequencies, the limited Atlanta-Sao Paulo/Rio de Janeiro flexibility requested is clearly in the public interest and should be granted whether or not the Department wishes to examine the broader issue of lifting all city-pair conditions.

### **Decision**

Under the U.S.-Brazil aviation agreement, U.S. carriers in combination service may operate a total of 105 weekly frequencies. Over the past decade, awards of frequencies for U.S.-Brazil combination service have been city-pair specific and have been the results of route carrier-selection proceedings, where carriers have sought awards for specific routes and have requested a specific number of frequencies for the operation of services over the requested routes. Delta, Continental, and American each holds certain Brazil frequencies awarded on this basis. They are not in a position to alter the city-pairs served without first seeking and securing express Department authorization. On the other hand, American also holds, as does United, certain Brazil frequencies obtained through route transfer cases as opposed to carrier-selection proceedings. These transferred frequencies were not tied to specific city-pairs, and as to these frequencies the carriers have been and remain free to change their service patterns without prior Department authorization. Clearly, then, the present allocation scheme for U.S. carrier use of Brazil frequencies is not uniform, with some carriers enjoying greater flexibility than others as to some or all of their frequencies.

It is in this context that we have reviewed Delta's request and the comments filed in response. Having thus reviewed the record, we have decided to grant the request and to afford the same flexibility to all four designated combination carriers for U.S.-Brazil services.<sup>4</sup> While we would not necessarily be prepared to follow this same approach in other markets, we believe that the disparate treatment of

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<sup>3</sup> Delta's response was accompanied by a motion for leave to file an otherwise unauthorized document. We will grant the motion. United, the fourth designated carrier, filed no pleadings in this matter.

<sup>4</sup> Since United already has this flexibility and since American has it in some instances, by our action here we would be according flexibility to Delta and Continental, and to American in those instances where it does not now have it. We need take no further steps as to United.

otherwise similarly-situated carriers in the Brazil market, along with the particularities of the current market environment, call for our according a greater degree of flexibility here than might be the case in other circumstances or settings. Thus, limited to the specific circumstances and context before us, we find that our decision here is consistent with the public interest.

We note that our action awards no new underlying economic authority. It is designed simply to enable the affected carriers to use with greater flexibility that Brazil authority which they already hold. Should any of the four carriers desire to serve with its existing frequencies a Brazilian point for which it holds no underlying authority, it must first seek and obtain that authority from the Department

We remind the carriers that frequencies to serve Brazil are valuable route rights that have been obtained in exchange for rights for Brazilian carrier services to the United States, and that it is not our policy to have such valuable rights wasted. Because we value the use of these frequencies, we will keep in place our dormancy provisions that are applicable to the allocation of frequencies. Under those provisions, carriers' frequencies automatically revert to the Department for reallocation when a carrier does not use its frequencies for a period of 90 days.<sup>5</sup>

ACCORDINGLY,

1. We grant the request of Delta Air Lines, Inc. for an amendment to the conditions applicable to its U.S.-Brazil frequencies so that the carrier may use its allocated frequencies in any markets where it holds underlying economic authority for U.S.-Brazil services;
2. We amend conditions applicable to the U.S.-Brazil frequency allocations held by American Airlines, Inc., and Continental Airlines, Inc., so that these carriers may use their allocated frequencies in any markets where they hold underlying economic authority for U.S.-Brazil services;
3. The authority granted in ordering paragraphs 1 and 2 above is effective immediately;
4. We may amend, modify, or revoke the terms of this order at our discretion and without hearing; and
5. We will serve this order upon American Airlines, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; the Ambassador of Brazil in Washington DC; and the U.S. Department of State.

By:

SUSAN MCDERMOTT  
Deputy Assistant Secretary for  
Aviation and International Affairs

(SEAL)

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[http://dms.dot.gov/reports/reports\\_aviation.asp](http://dms.dot.gov/reports/reports_aviation.asp)*

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<sup>5</sup> We note that Delta states that it will resume service with its seven frequencies now under waiver "on or about December 1, 2004," for its Atlanta-Sao Paulo service. Should Delta not resume services with each of the seven frequencies in question by December 14, 2004, it will automatically lose each frequency not operated.